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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID DO,

Defendant and Appellant.

B222863

(Los Angeles County Super. Ct.
No. GA067959)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed as modified.

Alan Ross, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

A Los Angeles jury found defendant and appellant David Do guilty of the first degree murder of Nhi Gip and the willful, deliberate, and premeditated attempted murder of Hung Tu. (Pen. Code, §§ 187, subd. (a), 664).¹ Special circumstance allegations that the murder was committed by means of intentionally discharging a firearm from a vehicle and committed by a gang member to further the activities of a criminal street gang were found true. (§ 190.2, subds. (a)(21) & (a)(22).) The jury also found that defendant personally and intentionally discharged a firearm in committing both offenses (§ 12022.53, subd. (d)), and he committed the shootings for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). Defendant received a sentence of life in prison without the possibility of parole for the murder, plus the 25 years to life firearm enhancement. He received a consecutive term of life with the possibility of parole, plus the firearm enhancement for the attempted murder.²

In his timely appeal, defendant contends his conviction must be reversed because the trial court failed to conduct an Evidence Code section 402 hearing to assess the nature of Kathy Thao Lenghiem's anticipated testimony and the likelihood she would refuse to answer questions before permitting the prosecution to call her as a rebuttal witness. Defendant also contends his consecutive sentence was error because the trial court relied on considerations that are only applicable to sentences imposed under the determinate sentencing law.

We modify the abstract of judgment to conform to the oral pronouncement of judgment and otherwise affirm. The trial court's decision to forego an Evidentiary Code section 402 hearing was reasonable in light of the prosecution's offer of proof and the fact that Lenghiem had no Fifth Amendment privilege against self-incrimination because

¹ All further statutory references are to the Penal Code unless stated otherwise.

² At sentencing, the trial court stated the sentence for the attempted murder was to be consecutive. However, the abstract of judgment erroneously lists that sentence as being concurrent. As the parties agree, the court's unambiguous statement imposing consecutive sentences is controlling. We order the abstract corrected to conform to the oral pronouncement of judgment.

she had been granted immunity for her testimony. Further, the court's sentencing choice was well within its discretion.

STATEMENT OF FACTS

On the night of November 18, 2006, a few weeks before the underlying shooting incident, Officer Ron Lee contacted defendant at 7618 Columbia Street in Rosemead. Defendant was in the company of Lenghiem, Garrett Quon, and Ann Chan. Quon had a tattoo identifying him as a member of the Wah Ching ("Chinese Youth") gang. Defendant and Lengheim admitted to being associates of the gang. Defendant's moniker was "Temper." Quon said he "walked out of the gang in 2004, but continued to associate with the gang up through 2005." Chan said she had no gang affiliation.³

On December 1, 2006 at 10:00 p.m., Hung Tu arrived at the Lollicup Tea Shop in San Gabriel. He drank tea while playing cards at an outside table. There were approximately 10 others outside, including his friends Ken and Vu Math. A white four-door car approached and pulled up next to him. There were four persons inside the vehicle. From a distance of 10 feet, defendant, who was sitting in the back passenger seat, leaned his head out of the window and asked, "What gang do you guys belong to?" Tu said they did not belong to any gang. Defendant pointed a black handgun toward the table where Tu and others were seated. Defendant fired multiple times. Tu was struck by three bullets—in his left hip, left armpit, and one that grazed his right eyebrow. Tu ran inside the tea shop, where someone called the police. He was treated by emergency personnel and taken to the hospital, where he received treatment for a month. Tu identified defendant's photograph from a photographic lineup.

³ Four years earlier, on the evening of June 17, 2002, Officer David Castellano interviewed defendant in Monterey Park. Defendant said he had become an "associate" of the Wah Ching gang a few months before and his moniker was "Temper."

Wang Gui was one of the card players outside the tea shop. He corroborated Tu's testimony and identified defendant as the shooter. Gui heard defendant say the name of the Wah Ching gang during the shooting incident. Gui's friend Nhi Gip was killed in the shooting. Gui identified defendant's photograph from the photographic lineup.

Mimi Math was also at the Lollicup with friends. As she was walking out, she saw defendant in the back seat of a car. She had seen him a few months before at two different locations. When the car approached and stopped in front of the tea shop, the passenger window was down. Defendant asked the people in front of the tea shop "where they come from," which she knew meant "something bad is going to happen." She began to leave and heard gunshots and people running away. She identified defendant's photograph from a photographic lineup.

Charles Zhu was seated at an outside table in front of the tea shop. A car drove up and a male passenger sitting in the front passenger seat asked what gang they were from. Zhu's friend said they were not from any gang. The person who asked the question said, "Wah Ching" and fired gunshots in their direction. The car was stopped at the time the shots were fired. Zhu identified defendant's photograph from a photographic lineup.

Vinh Truong was standing outside the tea shop, talking with friends, when the white car approached. Defendant, who was in the back passenger seat, put his head out of the open window and asked, "Where you from"? Defendant had asked him that same question three to four weeks earlier at the tea shop. Truong's friend said, "Nowhere," and they turned toward the parking lot. Truong heard gunshots from the direction of the white car. He identified defendant from a photographic lineup.

Chau Ly was standing in front of the tea shop and saw the car pull up. It was the same one she saw a week before outside the tea shop. On the prior occasion, a female was driving and defendant, the passenger in the front seat, asked Ly's friend, "Where are you from?" Her friend said, "Nowhere" and the car drove away. On December 1, defendant was in the rear passenger side seat and the same female was in the front passenger side. Defendant asked the same question and received the same response.

This time, however, the response was followed by gunshots from the car's passenger side.

Officer James Drabos responded to the scene at 11:38 p.m. He entered the tea shop and saw Tu on the floor, bleeding. Nhi Gip was sitting on the floor by the emergency exit, apparently unconscious. Officer Drabos examined Gip and detected no signs of life. Eighteen-year-old Gip died at the scene, having received three gunshot wounds—to the back and the right armpit—one of which was fatal.

On the morning of December 5, 2006, Deputy Joe Miranda and his partner stopped a white two-door Toyota Camry in Rosemead. The car was registered to Lenghiem, who was one of the three occupants, along with Quon and defendant. Quon had access to a white four-door BMW, which was registered to his parents. It was stipulated that defendant was arrested on December 5, 2006, and was held in custody since that date.

Deputy Jose Nanquil testified as an expert on the criminal street gangs with special reference to the Wah Ching gang. The gang had “several hundred” members; Deputy Nanquil had met with more than 50 in the past 20 years. Among the gang's primary activities are assault with a deadly weapon, robbery, and murder. Defendant was a Wah Ching member. Quon and Lenghiem are members of the gang. When a gang member asks, “Where are you from,” he or she is making a gang threat. The circumstances of the Tu and Gip shootings were indicative of a crime committed to benefit the Wah Ching gang, as it was preceded by a gang threat and would have been understood as enhancing the gang's reputation.

Defense

Defendant's mother, Ngoc Do, testified that her son lived with her at the time of the shooting incident. Defendant was home with her at 11:00 p.m. that night. She was in federal custody at the time of trial, having been convicted of a narcotics offense.

Private investigator David Martin interviewed Wang, who said the shooter's car was not white, but may have been green. Officer David Casillas responded to the shooting incident at the tea shop. He spoke to approximately eight witnesses, including Truong, who said the shooter was in a black late-model sedan. He did not see who fired the shots and could not identify the back seat passenger. Officer Casillas also interviewed Truong's girlfriend, Ly. She said the shooter was in a late-model white car. She described the person in the back passenger seat as a thin, male Asian, 18 to 21 years old.

Rick Reiser was standing at the counter of the tea shop when he heard gunshots. He looked outside and saw a male in the front passenger side of a car, hanging out of the window and shooting a revolver with his right hand. The shooter was an Asian-American in his early 20's. Reiser ran outside in an effort to get the car's license plate number. It was a white four-door BMW without a rear license plate; it did not look the one in the photograph of Quon's white BMW. There were four persons in the car; the driver was male. Reiser did not choose defendant's photograph from the photographic lineup; he made a tentative identification of another person's photograph. It was later stipulated that when defense counsel interviewed Reiser, the witness reviewed the police reports and pointed out no inaccuracies.

Psychologist Scott Fraser, Ph.D., an expert in eyewitness identification, testified about the principle of memory convergence or conformity, whereby a witness's memory of an event is supplemented by post-event perceptions and experiences in such a way as to bolster the witness's belief as to what actually occurred. Such additional, post-event perceptions and experiences can include statements of other witnesses and accounts in police reports. Thus, if witnesses are placed together in a location with the opportunity to converse prior to their police interviews (as was the case here), it is likely the witness accounts will conform with each other at the expense of accuracy. Witnesses who did not actually see something will come to believe they did, based on the reports of other witnesses.

DISCUSSION

Lenghiem's Refusal to Testify

Over defendant's objection, the prosecution called Lenghiem to testify as a rebuttal witness in order to refute Ngoc Do's alibi testimony that defendant was at home at the time of the shootings. However, when asked whether she was with defendant on the night of December 1, 2006, Lenghiem refused to testify—despite having been granted use immunity for her testimony and having been ordered to testify.

On appeal, defendant contends his right to a fair trial obligated the trial court to conduct an Evidence Code section 402 hearing before ruling that the prosecution was permitted to call Lenghiem as a rebuttal witness. The claim fails because the prosecution's grant of use immunity divested the witness of her right against self-incrimination and permitted the drawing of a negative inference from her unjustified refusal to testify, and defendant does not show how a section 402 examination would have affected the court's ruling. Moreover, in light of the court's instruction that the jury must not consider the witness's refusal as evidence of guilt, and the fact that Lenghiem did not testify against defendant, there is no reasonable likelihood that defendant suffered prejudice from the court's ruling.

Review of the record shows that following the completion Ngoc Do's testimony, the prosecutor informed the defense and the trial court that he intended to call Lenghiem as a rebuttal witness in order to contradict Do's testimony. Defense counsel was concerned that such testimony would implicate Lenghiem's pretrial confession. In anticipation, the defense had retained an expert to testify concerning "false confessions." The prosecutor explained that the confession would only become relevant if Lenghiem refused to testify that defendant was with her at the time of the shooting, in which case it would be offered as a prior inconsistent statement. In response to the court's concern that Lenghiem would refuse to testify and invoke her Fifth Amendment right against self-incrimination, the prosecutor said he contemplated offering the witness immunity.

After the defense presented its final witness, the court conducted a hearing outside the jury's presence concerning Lenghiem's presentation as a rebuttal witness. The prosecutor believed she would refuse to testify and requested the court order her to do so. Lenghiem was represented by counsel, having been charged with being an accessory after the fact in regard to the same shooting incident. The prosecutor's offer of proof was that defendant was with Lenghiem at 11:00 p.m. on the night of the shooting. She and defendant drove to another tea shop "to hit people up," before going to the Lollicup where the shooting took place.

The prosecutor requested an order requiring Lenghiem to answer questions, based on the prosecution's offer of use immunity to the witness under section 1324, "which permits grants of immunity to secure testimony, but withholds immunity from prosecution for perjury committed in giving that testimony." (*People v. Ervin* (2000) 22 Cal.4th 48, 81.) The trial court found her anticipated testimony would be self-incriminating. Under section 1324, the court found good cause to order Lenghiem to testify. The witness would be given immunity from prosecution for her testimony or any evidence she produced. As such, Lenghiem had no Fifth Amendment right against self-incrimination. The court ordered Lenghiem to answer questions concerning her knowledge of the facts related to the Gip and Tu shooting.

The defense requested an Evidence Code section 402 hearing to explore the nature and voluntariness of Lenghiem's confession and to determine whether she would testify as ordered. The trial court denied the request, finding the confession was not the subject of her anticipated testimony, and Lenghiem's representation as to whether she would testify would not be determinative because she might act differently when she appeared before the jury. Moreover, because the witness had no right to invoke the Fifth Amendment privilege, the prosecution was entitled to call the witness.

Lenghiem was called to testify. When asked whether she was with defendant on the night of December 1, 2006, she refused to testify. The trial court instructed the witness that she was required to answer the questions and to do so in good faith because she would not be prosecuted or penalized for her testimony. The court found she had no

privilege against self-incrimination and was required to answer the prosecutor's questions. When questioning resumed, Lenghiem testified that she understood why she was in court, but reiterated her refusal to testify. The court reinstructed her to answer and that her refusal could subject her to a finding of contempt. Nevertheless, Lenghiem refused to answer the prosecutor's next question—whether she was afraid to be in court. Lenghiem told the court that she was choosing not to comply with the court's order, and she would not answer any of the prosecutor's questions. The court found Lenghiem's refusal was the result of a deliberate choice not to comply with the court's order, and set the matter for a contempt hearing.

The trial court denied the defense request to give the pattern instruction concerning a witness's justified reliance on a privilege to refuse to answer a question, pursuant to Judicial Council of California Criminal Jury Instructions (2006-2007) CALCRIM No. 320 because that instruction contemplated a witness's legitimate invocation of a privilege.⁴ The court, however, requested counsel to provide suggestions for a limiting instruction consistent with the law. The court prepared its own instruction, which it gave after closing arguments: "During the trial, certain evidence was admitted for a limited purpose. The appearance of Ms. Lenghiem and anything as a result of it was received for the limited purpose only as it may relate to any expert opinion offered by Deputy Nanquil and for the basis of any expert opinion. [¶] You may consider that evidence only for that purpose and for no other. You may not consider it as evidence of the defendant's guilt."

The governing law is well established. Upon determination that a witness has a valid Fifth Amendment right not to testify, it is improper to require the witness to invoke the privilege in front of a jury so as to avoid the jury's drawing of a negative inference.

⁴ The instruction provides: "A witness may refuse to answer questions that call for privileged information. Under the law, <insert name of witness> was justified in refusing to answer certain questions. Do not consider (his/her) refusal to answer for any reason at all and do not guess what (his/her) answer would have been."

“‘But where a witness has no constitutional or statutory right to refuse to testify, a different analysis applies. Jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony.’ (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554, original italics.) And where a witness receives immunity, that witness’s testimony is compelled and the witness no longer has a privilege against self-incrimination. (*United States v. Washington* (1977) 431 U.S. 181; *Kastigar v. United States* (1972) 406 U.S. 441, 455-458; § 1324.)” (*People v. Morgain* (2009) 177 Cal.App.4th 454, 466-467.)

Defendant acknowledges that Lenghiem did not properly invoke the Fifth Amendment privilege, but nevertheless asserts the jury was likely to infer that she refused to testify because she aided and abetted defendant in committing the shooting offenses. The argument fails not only because there was no legal proscription against the drawing of a negative inference (e.g., *People v. Morgain, supra*, 177 Cal.App.4th at pp. 466-467), but because the trial court clearly admonished the jury against considering Lenghiem’s refusal as evidence of defendant’s guilt. “‘[It is] the almost invariable assumption of the law that jurors follow their instructions.’ [Citation.] ‘[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.’ [Citations.]” (*United States v. Olano* (1993) 507 U.S. 725, 740.) There is nothing in the record—including counsel’s arguments—to suggest the jury did otherwise here.

Moreover, defendant fails to explain how the trial court’s refusal to conduct an Evidence Code section 402 hearing was erroneous or prejudicial. As the court reasoned, not only had Lenghiem lost her right against self-incrimination, but the witness’s representation in such a hearing as to what she would say or do might well change when the witness actually faced the jury. Additionally, the prosecution had made a detailed offer of proof and there was no indication additional fact-finding would have been fruitful. As such, defendant fails to show error, constitutional or otherwise.

Raising the issue for the first time in his reply brief, defendant argues Lenghiem's refusal to testify resulted in a violation of his right to confront and cross-examine witnesses under the federal Supreme Court's *Crawford* line of cases. (See *Crawford v. Washington* (2004) 541 U.S. 36, 68.) We need not consider this claim. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) In any event, as the trial court recognized, there was no basis for objecting on confrontation grounds because Lenghiem did not testify and her refusal was not offered for the truth. "The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]" (*Crawford, supra*, 541 U.S. at p. 59, fn. 9; *People v. Combs* (2004) 34 Cal.4th 821, 842; see *Tennessee v. Street* (1985) 471 U.S. 409, 413-414.)

Finally, we agree with the Attorney General that any purported error would have been harmless under any recognized standard. Not only was the jury instructed not to consider Lenghiem's refusal as evidence of guilt, but the prosecution evidence, which included multiple eyewitness identifications, was truly overwhelming.

Sentencing

Defendant contends his sentence was improper because the trial court relied on immaterial considerations as the basis for imposing a consecutive term for the attempted murder conviction. We disagree.

The trial court explained its sentencing decision as follows: "Although the court need not state reasons, the court does note that the crimes involved separate victims, great violence, bodily harm and a high degree of viciousness and cruelty." The defense interposed no objection. The reviewing standard is well established. "In deciding whether to impose consecutive terms, the trial court may consider aggravating and mitigating factors, but there is no requirement that, in order to justify the imposition of consecutive

terms, the court find that an aggravating circumstance exists. (See § 669; Cal. Rules of Court, rule 4.425(a)-(b).) Factual findings are not required.” (*People v. Black* (2007) 41 Cal.4th 799, 822.) When, as here, a defendant is sentenced consecutively to two indeterminate terms (see § 1168, subd. (b)), determinate sentencing rules do not apply and the trial court has “full discretion” to impose consecutive sentences under the indeterminate sentencing law. (*People v. Murray* (1990) 225 Cal.App.3d 734, 750.) “Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered.” (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

As the Attorney General argues, by failing to object, defendant failed to preserve this sentencing claim. “[T]he waiver doctrine should apply to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it . . . failed to state any reasons or give a sufficient number of valid reasons.” (*People v. Scott* (1994) 9 Cal.4th 331, 353; *People v. Quintanilla* (2009) 170 Cal.App.4th 406, 412-413.)

Moreover, “California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term for an enhancement.” (*People v. Quintanilla, supra*, 170 Cal.App.4th at p. 413, quoting *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.) Here, the existence of multiple victims by itself supported the imposition of consecutive sentences. (See, e.g., *People v. Calhoun* (2007) 40 Cal.4th 398, 408; *People v. Shaw* (2004) 122 Cal.App.4th 453, 458 [“the court may impose consecutive sentences for separate acts of violence against multiple victims”].) The trial court’s common sense reference to sentencing factors that also apply to determinate sentences hardly qualifies as judicial error. Contrary to defendant’s assertion, the court’s sentencing determination found ample support in the record and our independent review discloses no abuse of discretion.

DISPOSITION

We order the abstract of judgment corrected to conform to the oral pronouncement of judgment that the sentence for attempted murder is to be served consecutively. (See fn. 2, *ante*.) A copy of the corrected abstract of judgment shall be forwarded to the Department of Rehabilitation and Corrections. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.